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Bank Pertanian Malaysia Bhd (previously known as Bank Pertanian Malaysia) v Nora'rifah bt Darus

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02–626–03 OF 2012
LIM YEE LAN, ZAWAWI SALLEH AND UMI KALTHUM JJCA
22 MAY 2014

Evidence — Judge — Failure to consider all evidence — Whether trial judge came to decision based on only part of the evidence while ignoring other parts — Whether conflicting witness testimonies on material facts in issue required trial judge to make specific findings of fact and give reasons for accepting one version and rejecting another — Whether on totality of evidence trial judge failed to appreciate defendant's case more probable and plaintiff's case fraught with inconsistencies, contradictions and shifting of facts

The High Court had upheld the respondent's claim that her signatures on two charges over her land in favour of the appellant were forged. The court held the charges to be null and void and ordered the title to the land be returned to the respondent free of the incumbrance. Although the Chemistry Departments, both in Malaysia and Singapore, were unable to confirm whether the respondent's signatures on the charge documents had been forged, the High Court took the view it could come to a decision on the point based on the oral evidence of the witnesses. In that regard, the court took into account the respondent's evidence (supported by the oral evidence of a school's headmaster and documentary evidence of the school's attendance sheet) that she was teaching in Perak (and was not in Pahang where the charges were executed) on the dates specified on the charges and that she promptly lodged police reports on knowing about the existence of the charges. Although two solicitors ('SD2 and SD3') who attested the signatures on the charge documents testified that the plaintiff had signed the documents about a week or two prior to the dates they were stamped, the trial judge did not take their evidence into account. It was the respondent's contention that without her knowledge, her sister in law had used her title deed to the land to create the charges to obtain loans from the appellant to fund a business. When the appellant commenced foreclosure proceedings on the land, the respondent took out an injunction to stop the auction and sought to declare the charges null and void. In the instant appeal, the appellant contended that the trial court failed to judicially evaluate all the evidence in totality; that only some parts of the evidence were given greater scrutiny whilst other parts were totally ignored.

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Held, allowing the appeal with costs and setting aside the decision of the High Court:

(1) The respondent's denial that the signatures on the charges were hers was contradicted by the evidence of the appellant's witnesses. Her averment, when tested against the totality of the evidence, remained doubtful and could not bring home the allegation of forgery. On the other hand, the appellant had adduced sufficient and convincing evidence to show proof of execution of the documents as required by law (see para 30).

(2) The appellant had adduced uncontroverted evidence establishing that both SD2 and SD3 had prepared statutory declarations and averred that they had witnessed the due execution of the security documents and that they had, in the process, made copies of the respondent's identity card. They had also stated that the dates on the security documents were not the execution dates and that the respondent had executed them much earlier. The trial judge did not accept the solicitors' evidence. The factor which weighed in her mind to conclude that the solicitors' evidence could not be relied upon was the fact SD2 had failed to identify the respondent. But the trial judge ignored the fact the respondent had acknowledged in court that she recognised SD2. That acknowledgement ran counter to her evidence that she had never seen SD2 and SD3 before (see paras 23–26).

(3) The respondent did not put forth any evidence to rebut that she executed the security documents. She merely stated she was not in Pekan at the material time and, with regard to the second charge, produced the school's attendance sheet. The trial judge appeared to have treated the respondent's evidence as an alibi. The respondent also demonstrated a selective memory of events and after lodging police reports in 2006 about the alleged forgery she took no action and only filed the suit in 2008 when the auction was three weeks away. She did not explain her failure to act promptly to protect her interest over the land (see paras 21 & 29).

(4) The respondent's version of the case was fraught with inconsistencies, contradictions and a lot of shifting of facts. It was trite that when witnesses gave conflicting evidence on material facts in issue, the trial judge had to make specific findings on the point and in so deciding had to give reasons for rejecting one version and accepting another. This was not done by the trial judge in the instant case. A court could not base its conclusion on only part of the evidence and ignore the other parts (see paras 22 & 28).

[Bahasa Malaysia summary

Mahkamah Tinggi telah mengekalkan tuntutan responden bahawa tandatangan-tandatangannya pada dua pajakan ke atas tanah yang berpihak kepada perayu telah dipalsukan. Mahkamah memutuskan bahawa

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pajakan-pajakan tersebut tidak sah dan terbatal dan memerintahkan hakmilik tanah tersebut dikembalikan kepada responden tanpa apa-apa bebanan. Walaupun jabatan-jabatan kimia, kedua-dua di Malaysia dan Singapura, tidak dapat mengesahkan sama ada tandatangan-tandatangan responden pada dokumen-dokumen pajakan telah dipalsukan, Mahkamah Tinggi berpendapat bahawa ia boleh membuat keputusan tentang fakta tersebut berdasarkan keterangan lisan saksi-saksi. Bersangkutan itu, mahkamah mengambil kira keterangan responden (disokong oleh keterangan lisan guru besar sekolah dan keterangan dokumentar senarai kehadiran sekolah) bahawa dia mengajar di Perak (dan tidak berada di Pahang di mana pajakan-pajakan tersebut dilaksanakan) pada tarikh-tarikh yang dinyatakan dalam pajakan-pajakan dan bahawa dia segera membuat laporan polis setelah mengetahui tentang kewujudan pajakan-pajakan tersebut. Walaupun dua peguamcara ('SD2 dan SD3') yang menyaksikan tandatangan-tandatangan pada dokumen-dokumen pajakan memberi keterangan bahawa plaintif telah menandatangani dokumen-dokumen lebih kurang seminggu atau dua minggu sebelum tarikh kedua-duanya dimatikan setem, hakim bicara tidak mengambil kira keterangan mereka. Adalah menjadi hujahan responden bahawa tanpa pengetahuannya, kakak/adik iparnya telah menggunakan surat ikatan hakmilik tanah tersebut untuk membuat pajakan-pajakan bagi mendapatkan pinjaman-pinjaman daripada perayu untuk membiayai satu perniagaan. Apabila perayu memulakan prosiding rampasan harta ke atas tanah tersebut, responden mengemukakan injunksi untuk menghentikan lelongan dan memohon untuk mengisytiharkan pajakan-pajakan tersebut sebagai tidak sah dan terbatal. Dalam rayuan ini, perayu menghujahkan bahawa mahkamah bicara gagal untuk menilai secara kehakiman kesemua keterangan secara keseluruhan; bahawa hanya sebahagian keterangan sahaja yang diberikan penelitian manakala bahagian-bahagian lain diabaikan sama sekali.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan keputusan Mahkamah Tinggi:

(1) Penafian responden bahawa tandatangan-tandatangan pada pajakan-pajakan adalah miliknya disangkal oleh keterangan saksi-saksi perayu. Hujahannya, apabila diuji dengan keseluruhan keterangan, kekal meragukan dan tidak dapat membuktikan dakwaan pemalsuan. Sebaliknya, perayu telah mengemukakan bukti yang cukup dan meyakinkan untuk menunjukkan pelaksanaan dokumen-dokumen seperti yang diperlukan oleh undang-undang (lihat perenggan 30).

(2) Perayu telah mengemukakan keterangan yang tidak boleh disangkal membuktikan bahawa kedua-dua SD2 dan SD3 telah menyediakan deklarasi-deklarasi statutori dan menghujahkan bahawa mereka telah menyaksikan pelaksanaan wajar dokumen-dokumen sekuriti dan bahawa mereka, dalam proses itu, telah membuat salinan-salinan kad pengenalan responden. Mereka juga telah menyatakan bahawa

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tarikh-tarikh pada dokumen-dokumen sekuriti bukanlah tarikh-tarikh pelaksanaan dan bahawa responden telah melaksanakan kesemuanya terlebih dahulu. Hakim bicara tidak menerima keterangan peguamcara. Fakta yang memberati mindanya adalah untuk menyimpulkan bahawa keterangan peguamcara tidak boleh disandarkan adalah fakta bahawa SD2 gagal mengenal pasti responden. Namun begitu, hakim bicara mengabaikan fakta bahawa responden mengakui dalam mahkamah bahawa dia mengenali SD2. Pengakuan ini bertentangan dengan keterangannya bahawa dia tidak pernah melihat SD2 dan SD3 sebelum ini (lihat perenggan 23–26).

(3) Responden tidak mengemukakan apa-apa keterangan untuk menyangkal bahawa dia telah memeterai dokumen-dokumen sekuriti. Dia hanya menyatakan bahawa dia tidak berada di Pekan pada masa material dan, berkenaan pertuduhan kedua, mengemukakan senarai kehadiran sekolah. Hakim bicara kelihatan menganggap keterangan responden sebagai alibi. Responden juga menunjukkan memori terpilih terhadap kejadian-kejadian dan selepas membuat laporan polis pada 2006 mengenai pemalsuan yang didakwa, dia tidak mengambil sebarang tindakan dan hanya memfailkan guaman pada tahun 2008 apabila lelongan hanya tinggal tiga minggu sahaja lagi. Dia tidak menjelaskan kegagalannya untuk bertindak segera bagi melindungi kepentingannya ke atas tanah tersebut (lihat perenggan 21 & 29).

(4) Versi responden mengenai kes penuh dengan ketidakselarasan, percanggahan dan banyak perubahan fakta. Adalah matan bahawa apabila saksi-saksi memberi keterangan bercanggah mengenai fakta-fakta material yang menjadi isu, hakim bicara perlu membuat dapatan-dapatan khusus mengenai fakta dan dalam berbuat sedemikian, hendaklah memberi alasan-alasan untuk menolak satu versi dan menerima yang satu lagi. Ini tidak dilakukan oleh hakim bicara dalam kes ini. Mahkamah tidak boleh menyandarkan kesimpulannya pada satu bahagian keterangan sahaja dan mengabaikan bahagian-bahagian yang lain (lihat perenggan 22 & 28).]

Notes

For cases on failure to consider all evidence, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2235–2236.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (refd)

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165b, PC (refd)

Darshan Singh Hullan & Anor v Rangasamy a/l Kailasam & Anor [2013] 2 MLJ 51, CA (refd)

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Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Harun bin Abd Rahim & Anor v Jamian bin Mashood & Anor [2013] 7 MLJ 105, HC (refd)
Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)
Multar v Lim Kim Chet & Anor [1982] 1 MLJ 184; [1982] CLJ 107, FC (refd)
Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149, CA (refd)
Sundran a/l Ramasamy v Arjunan a/l Arumugam & Anor [1994] 4 CLJ 300, SC (refd)
United Asian Bank Bhd v Tia Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)

Appeal from: Civil Suit No MT(2) 22–134 of 2008 (High Court, Kuantan)

A Ramanathan (Loke, Chew & Zainal) for the appellant.
Mohd Taufik bin Md Tahir (Bob S Arumugam & Co) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant ('the second defendant') appealed against the decision of the High Court at Kuantan in which the court had allowed the plaintiff's claim and declared that the security documents registered on land under title GM 69 Lot 1527, Mukim Pekan, District of Pekan, Pahang ('the said land') under presentation No 18/2003 registered on 15 January 2003 and presentation No 679/2004 registered on 13 August 2004 were null and void by reason of forgery. The court further ordered that the charge endorsements to the second defendant be deleted from the registration/record and the land title be returned to the plaintiff.

[2] On 15 November 2013 we unanimously allowed the appeal with costs fixed at RM5,000. Deposit to be refunded to the second defendant.

[3] We now give our grounds.

[4] We will refer to the parties as they stood at the trial.

FACTS OF THE CASE

[5] The facts of the case which are germane to the disposal of this appeal can be briefly recounted thus: The plaintiff was the registered proprietor of the said land. The plaintiff alleged that unbeknown to her, the first defendant (the

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plaintiff's sister in law) had obtained loans from the second defendant to fund a project ie 'Projek Ternakan Ayam daging di Kampung Sepat Kuantan'. The security for both loans was two third party charges over the said land which was perfected and executed vide presentation Nos 18/2003 and 679/2004 respectively.

[6] The plaintiff had lodged the first police report on 18 January 2006 at Bagan Serai Police Station and the second police report on 27 January 2006 at Kuantan Police Station.

[7] The first defendant defaulted payment. After various notices of demand to both the first defendant and the plaintiff demanding for payment, the second defendant obtained order for sale and commenced foreclosure proceedings and the auction was set on 24 September 2008.

[8] In year 2008, the plaintiff commenced legal proceedings for an injunction to call off the auction and a declaration that the charges were null and void. She denied having executed the security documents dated 31 December 2002 and 11 August 2002. She also claimed that her signatures on the security documents were forged.

[9] The first defendant did not enter appearance and the case proceeded with no order made against her. The second defendant refuted the plaintiff's claim and contended that both security documents were duly prepared by Messrs Mohd Sofian & Co and Messrs Bahari Choy & Nongchik respectively and the execution were done before the solicitors attached to the firms.

[10] On 13 February 2012, the learned trial judge allowed the plaintiff's claim. Hence, this appeal.

THE APPEAL

[11] The sole issue for determination in this appeal is whether the security documents dated 31 December 2002 and 11 August 2004 were forged.

[12] In order to substantiate her claim of forgery, the plaintiff gave oral evidence that she was at Bagan Serai, Perak on 31 December 2002 and on 11 August 2004 and could not possibly execute both security documents. Mohd Salim bin Abdul Rahman ('SP1'), the headmaster of Sekolah Kebangsaan Jalan Matang Buluh, Bagan Serai Perak, was called and the school attendance sheet was produced to confirm the plaintiff's attendance at the school on 11 August 2004. The plaintiff claimed that she resided in Bagan Serai from year 2002 until year 2008. The plaintiff's mother ('SP2') also testified

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that the original issue document of title was stolen by her son, ie the first defendant's husband but it was returned to her subsequently.

[13] The learned trial judge held that the allegation of forgery had to be established beyond reasonable doubt. Her Ladyship found that on the evidence adduced, the plaintiff did not execute the security documents and her signatures were forged. Her Ladyship's finding was premised on the following grounds:

(a) the plaintiff was not in Pekan at the material time and she was in Bagan Serai where she was teaching;

(b) the plaintiff took immediate action to lodge police reports;

(c) both solicitors (SD2 and SD3) maintained that the plaintiff had signed the documents one or two weeks prior to the stamping date. However, neither could remember when exactly the plaintiff executed the security documents;

(d) SD2, the first attesting solicitor who prepared the first set of security documents, failed to identify the plaintiff;

(e) he statutory declarations dated 22 November 2010 and 13 October 2011 were made many years after the execution; and

(f) even though both Malaysian and Singapore Chemistry Departments could not confirm whether the signatures were forged, the court could rely on the oral evidence of the witnesses.

PARTIES' COMPETING SUBMISSIONS

[14] Learned counsel for the second defendant submitted that the learned trial judge had misconceived the standard of proof, when she held that when a plaintiff pleaded forgery, the standard of proof is beyond reasonable doubt. According to learned counsel, the plaintiff did not plead fraud. She only pleaded forgery and under the law the burden is on balance of probabilities (see *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 (FC)).

[15] Learned counsel further submitted that the central issue of this appeal was not the measure of proof adopted by the learned trial judge, but her failure to consider the entire evidence of the witnesses brought on record in the examination in chief, cross-examination and re-examination. In other words, it was the contention of learned counsel that there was no judicial evaluation of evidence in totality but isolated scrutiny of the evidence by the learned trial judge.

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[16] In reply, learned counsel for the plaintiff submitted that although the learned trial judge erred when she made her decision by using the wrong standard of proof in this instant case, however, the evidence adduced before the court was sufficient to bring home a case of forgery on a balance or probabilities.

[17] During the course of the argument, learned counsel for plaintiff reminded us that evaluation of evidence is primarily the function of the trial judge. Interference by an appellate court could only occur where and when the trial judge fails to evaluate such evidence at all or he or she fails to do so properly. Where, therefore, the trial judge has satisfactorily performed his or her function of evaluating the evidence and correctly ascribing probative value to it, an appellate court has no business interfering with the finding on such evidence (see *Harun bin Abd Rahim & Anor v Jamian bin Mashood & Anor* [2013] 7 MLJ 105; *Darshan Singh Hullan & Anor v Rangasamy a/l Kailasam & Anor* [2013] 2 MLJ 51; *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149). Learned counsel submitted that it was not correct to contend that the way in which the learned trial judge had approached the case was wrong and that her decision was not justified.

OUR FINDINGS

[18] At the outset we must say that the jurisdiction of the appellate court to intervene with the finding of facts by a trial judge is well defined in catena of decisions by our courts. It has been settled that an appellate court can intervene with the finding of facts when the findings are grounded entirely on speculations, surmises or conjectures; when an inference made by a trial court from its factual findings is plainly wrong, absurd or illogical; where there is none or insufficient judicial appreciation of evidence; when the findings of a trial court run contrary to the admission of the parties to the case, or fail to notice certain relevant facts which if properly considered, will justify a different conclusion; when the findings of fact are premised on the absence of evidence, or are contradicted by the evidence on record (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC); *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650b; *Sundran a/l Ramasamy v Arjunan a/l Arumugam & Anor* [1994] 4 CLJ 300 (SC); *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184; [1982] CLJ 107 (FC); *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165).

[19] In this instant case, after having heard the parties at length and upon careful perusal of the records of appeal, we were of the considered opinion that this was a case in which appellate intervention was warranted.

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[20] We agreed with the submission of learned counsel for the second defendant that the plaintiff's case was one of forgery and the standard of proof was 'on the balance of probability' as held by the then Supreme Court in *United Asian Bank Bhd v Tia Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, p 188, where Anuar J (later CJ Malaya) said:

> Another important matter has been raised by the appellant in connection with the issue of forgery. It was argued for the appellant both in the court below and before us that the standard of proof required in cases such as this should be beyond a reasonable doubt and *Syarikat Perkapalan Timor v United Malayan Banking Corp Bhd* [1982] 2 MLJ 193 was cited in support. We have examined this decision with some care but we are unable to agree with the appellant's Counsel that it is authority for the proposition that is put forward for the appellant. In our judgment, a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities and in this respect, we agree with the statement of the law by Gunn Chit Tuan J (as he then was) in *Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218 where at p 220 the learned judge said:
>
> > In this case although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged by the said Awang alias Che Mah bin Che Lob, yet I was satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiffs but were forged or placed thereon without the plaintiff's authority and were therefore wholly inoperative.
> >
> > We are therefore of the opinion that the learned judge did not misdirect himself on the measure of proof that is required to bring home a case of forgery on the facts of such a case as the one before us.

[21] The plaintiff vehemently denied that the charges were executed by her. The plaintiff did not put forth any evidence to rebut the execution of the security documents. She merely stated that she was not in Pekan at the material time. In respect of the second charge, the school attendance sheet was produced. It would appear that the learned trial judge had treated the plaintiff's absence at the material time as an alibi.

[22] To our minds, the learned trial judge took an over simplistic approach in assessing the evidence. It is trite that a court has to look at the totality of the evidence and it is important not to slice one part of the evidence away from the whole. A court does not base its conclusion, whether to allow or dismiss the claim on only part of the evidence. What must be borne in mind is that the conclusion which is reached must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

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[23] In this instant case, the second defendant had adduced uncontroverted evidence establishing that both SD2 and SD3 had prepared statutory declarations and averred that they had witnessed the due execution of the security documents.

[24] The learned trial judge did not accept the solicitors' evidence. The factor which weighed in the mind of the learned trial judge to come to the conclusion that the solicitors' evidence could not be relied upon was the fact that SD2 had failed to identify the plaintiff. However, she had ignored the fact that the plaintiff, in answering the court's question, acknowledged that she recognised SD2. The plaintiff's own acknowledgment, ran counter to her evidence given during examination-in-chief that she had never seen SD2 and SD3 before. If the plaintiff's assertion was true, it was inconceivable for the plaintiff to recognise SD2. Further, SD3 had identified the plaintiff and could comment that the plaintiff had put on some weight.

[25] Both SD2 and SD3 stated that in the process of the execution, they had made copies of the plaintiff's identity card. The plaintiff attempted to offer an explanation that she gave the photocopied identity card to her sister, Khatijah Hanim. The first defendant could have taken it from Khatijah Hanim and gave it to the solicitors. However, the said sister was not called to verify the assertion. Further, both SD2 and SD3 were also not cross-examined on this fact.

[26] Both SD2 and SD3 stated that the security documents were dated and stamped. Both SD2 and SD3 maintained that the date 31 December 2002 and 11 August 2004 were not the execution dates and the plaintiff had executed the documents earlier.

[27] The plaintiff also called her mother (SP2) to substantiate her claim of forgery. SP2 stated that the original title was stolen by her son, the first defendant's husband. Her evidence contradicted the plaintiff's evidence that the original title was taken by the first defendant herself. Both versions were unconceivable as there was no need for either the first defendant nor her husband to return the original title to SP2 if they intended to perform a third party charge without SP2 or the plaintiff's knowledge.

[28] A plain wading through the evidence both oral and documentary revealed that the plaintiff's version of the case was fraught with inconsistencies, contradictions and a lot of shifting of facts. It is trite that when witnesses have given conflicting evidence on material facts in issue, the trial judge before whom such evidence is led must make specific findings on the point and in so deciding must give reasons for rejecting one version and accepting the other. Unless this is done, it is unsafe for the court to rely on any evidence before it. Unfortunately, this was not done by the learned trial judge in this instant case.

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[29] Further, we found that the plaintiff had demonstrated that she had a very selective memory of events. She strongly denied the execution of these two charges in 2002 and 2004 but could not remember how the land was transferred to her by her father, or the details of the sale and purchase of a house in 2008. The probability of her evidence was further impaired by her own conduct. The plaintiff had discovered the charges on 17 January 2006 and reported the matter to the authorities on 18 January 2006 and 27 January 2006. She took no action after making those reports and only filed the writ and statement of claim on 4 September 2008 when the auction was three weeks away. She had not explained her failure to act promptly in protecting her interest over the said land.

CONCLUSION

[30] In the instant appeal, the denial by the plaintiff that the signatures on these charges were not hers was contradicted by the evidence from the defendant's witness. Her averment, when tested against the totality of the evidence, remained doubtful and could not have brought home the allegation of forgery. On the other hand, the defendant had adduced sufficient and convincing evidence to show proof of execution of document required by law.

[31] We were satisfied that had the learned trial judge adopted the correct approach to the evaluation of the evidence, she would have dismissed the plaintiff's claim. Consequently, the appeal was allowed with costs and we set aside the decision of the learned trial judge.

Appeal allowed with costs and decision of High Court set aside.

Reported by Ashok Kumar